No. 4410

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

Old Colony Trust Company, a corporation, The First National Bank of Boston, a National Banking Association, National Bank of Commerce in New York, a National Banking Association, The First National Bank in St. Louis, a National Banking Association, National Shawmut Bank of Boston, a National Banking Association, National City Bank, a National Banking Association, and First National Bank of Chicago, a National Banking Association,

Appellants,

vs.

Union Land & Cattle Company, a corporation, and W. T. Smith, Receiver of said Union Land & Cattle Company, Under and By Virtue of that Certain Order Given and made by the District Court for the District of Nevada, on July 28, 1920, Silveria Garat, W. T. Hitt, Emma McLaughlin, Henrietta Moffat, Maud B. Clemons, Frances C. Rickey, W. A. Dill, W. H. Frazer, Elizabeth Sharp, Mrs. Aloysius Davey, and J. W. Dorsey,

Appellees.

BRIEF FOR APPELLANTS.

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Table of Contents

Pages

I. STATEMENT OF THE CASE 1-12

The circumstances under which the order appealed from was made by the District Court 3-7

The circumstances under which the purchase was made by the Receiver 7, 8

By applying this sum of $10,000 to the purchase of its lands, the fund available to the unsecured creditors is depleted and that which is subject to the lien of the bond mortgage is increased 8, 9

The grounds upon which the District Court seeks to sustain the order are invalid 10-12

II. ASSIGNMENTS OF ERROR 12, 13

III. BRIEF OF THE ARGUMENT .... 13 - 30

(1) It is error for a court to authorize the receiver of a private corporation to invest in land. Under the circumstances here shown, the order appealed from was clearly an abuse of discretion .... 13 - 18

(2) The order of August 4, 1924, authorizing the purchase of the Lesher lands and the payment of $10,000 plus interest, therefor, is in violation of the mandate of this court in Appeals Nos. 4195 and 4196 .... 18 - 19

(3) The order authorizing the purchase of the Lesher lands and the expenditure of $10,000 thereon by the Receiver is invalid as to appellants because it takes from them $10,000 and transmutes it into property which becomes subject to the lien of the bond mortgage .... 20 - 21

(4) The points relied upon by the court and the Receiver in justification of the purchase are invalid .... 21 - 30

Pages

(a) The contention of the District Court and the Receiver that the purchase of the lands was essential to the protection of the Spanish Ranch is insufficient .... 22 - 25

(b) The contentions of the District Court and of the Receiver that the lands are worth at least the price paid for them .... 25 - 27

(c) The argument of the District Court and the Receiver that failure to approve the purchase would result in the loss of the amounts already paid .... 27 - 30

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Appellees.

BRIEF FOR APPELLANTS.

I. STATEMENT OF THE CASE.

This appeal is related to Appeal No. 4409, with which it is submitted.

The appeal is from an order of the United States District Court for the District of Nevada, made on August 4, 1924, in an action pending in said District Court entitled "The First National Bank of San Francisco, a Corporation, Complainant, v. Union Land and Cattle Company, Defendant," and numbered "In Equity B-11". By the order complained of, the District Court approved the action of W. T. Smith, the Receiver appointed by it in said action No. B-11, in purchasing from one R. M. Lesher a tract of approximately 1,200 acres of land situate in Elko County, Nevada, and in paying therefor the sum of $10,000 and interest out of moneys of the Cattle Company in his hands as such Receiver.

The appellants are the same seven Eastern banking corporations who appear as appellants in Appeal No. 4409 and are unsecured creditors of the Union Land and Cattle Company in principal amounts aggregating $1,800,000. They have been permitted to intervene in said action No. B-11 and in that action their claims were allowed in full on March 1, 1924, as proper unsecured claims against the Union Land and Cattle Company. Since May, 1923, they have been persistently endeavoring, both before the District Court and before this court, to bring about the sale and liquidation of the assets of the Cattle Company; the application of the proceeds of such sale *pro tanto* in satisfaction of their own claims and the claims of the other unsecured creditors of the Cattle Company; and, finally, the termination of the receivership.

The circumstances under which the order appealed from was made by the District Court.

The order authorizing the purchase and the payment of the purchase price by the Receiver was made, as above stated, on August 4, 1924.

It is necessary to go back and to outline the status of the receivership at the time this order was made in order to understand its full import.

Action No. B-11, in which the order complained of was made, was commenced on July 28, 1920. At that time the Union Land and Cattle Company was indebted to appellants and to The First National Bank of San Francisco (the complainant in Action No. B-11) upon unsecured notes either due or soon to become due, the principal amounts of which aggregated $2,200,000. In addition, it owed on unsecured commercial paper, either due or about to become due, approximately $650,000. In addition, it owed to the so-called Nevada creditors unsecured debts the principal amount of which aggregated approximately $500,000. It also owed approximately $1,000,000 upon a bond mortgage, the principal amount of the indebtedness secured by which had been originally $1,200,000. This bond mortgage was secured by a deed of trust embracing approximately 224,000 acres of land in the State of Nevada owned by the Cattle Company and approximately two-thirds of the capital stock of the Antelope Valley Land and Cattle Company, a subsidiary corporation.

The total holdings of the Union Land and Cattle Company including the properties owned by its sub-

sidiaries, the said Antelope Valley Land and Cattle Company and the McKissick Land and Cattle Company, comprised approximately 350,000 acres of land in the State of Nevada and in counties of the State of California bordering Nevada, together with approximately 50,000 head of cattle and 50,000 head of sheep, and together with horses and ranch equipment sufficient to make possible the carrying on of the enterprise.

The receivership action was commenced on July 28, 1920, and W. T. Smith was appointed Receiver, to meet the situation created by the insolvency of the company; to prevent the dismemberment of the property, if possible, and to draw together all of the large number of creditors of the Cattle Company.

The first two or three years of the receivership were occupied in endeavors to bring about a reorganization. These efforts failed in the spring of 1923 and the conflict then arose, with which this court is familiar, between the complainant in the action and the intervening banks upon the one hand, urging the speedy liquidation of the assets of the receivership and the termination of the receivership itself, and the Union Land and Cattle Company and the Nevada creditors upon the other hand, the latter seeking the continuation of the receivership and the carrying on of its activities as a going concern in the hope of improved market conditions in the livestock business and in the market for livestock properties in the State of Nevada.

In August, 1923, the complainant and the seven intervening banks (the present appellants) filed petitions in

the District Court in action No. B-11, asking that the Receiver be directed to sell the properties of the Union Land and Cattle Company immediately and bring the receivership to a conclusion. In October, 1923, the Receiver filed a petition asking for leave to invest $110,000 in additional livestock and for leave to borrow money therefor and to issue Receiver's certificates for the moneys so borrowed. The petition of the seven banks for liquidation and the petition of the Receiver for leave to invest, etc., were heard by the District Court and decided on November 3, 1923, the District Court denying the order for liquidation and granting the petition of the Receiver for authority as prayed for. Appeals were prosecuted by the complainant and the seven banks from these orders and were argued and submitted to this court on March 28, 1924.

Upon Appeal No. 4195, involving the order of liquidation, this court modified the order of the District Court and directed the District Court to proceed to liquidate the properties of the Cattle Company in accordance with principles laid down in this court's opinion. Upon Appeal No. 4196, involving the authorization of the Receiver to invest in livestock, etc., this court reversed the order of the District Court. The decision and opinion of this court was rendered on April 7, 1924. In deciding these two appeals, this court said:

> "The cattle company is a private corporation, in every sense of the word, engaged in a private enterprise, and the magnitude of its holdings does not change its character or give it immunities not enjoyed by other debtors. For almost four years

> the processes of the courts against its property have been stayed, to enable it to rehabilitate itself and refund or liquidate its indebtedness. Nothing has been accomplished by it during that period, and henceforth the rights of creditors should be the chief concern of the courts. There is no reason or excuse for further continuance of the receivership, except to make a sale of the property for the best price and on the best terms obtainable, and there should be no further delay trusting to or hoping for a change in conditions, or for speculative purposes." * * * "As already stated, the order authorizing the incurring of an indebtedness of $110,000. for the purchase of additional cattle and sheep, seems inconsistent with a policy of speedy liquidation. Such orders may have been justified in the earlier stages of the receivership, but the time has arrived when there should be retrenchment instead of expansion."

Following the decision of this court in Appeals Nos. 4195 and 4196, the Receiver applied to the District Court on May 23, 1924, for instructions as to how to proceed in the matter of liquidation. On May 26, 1924, the Receiver also filed the petition upon which the order herein appealed from was based. In said petition he recited that he had made a contract for the purchase of the property in question from R. M. Lesher for $10,000 with interest, and asked the District Court to authorize him to make a final payment of $4,241.33 which became due thereon on June 21, 1924. The petition of the Receiver for instructions and the petition for approval of the purchase and the authorization to make payments came on for hearing on June 18, 1924. On August 4, 1924, the District Court decided both matters

in a single order in which he instructed the Receiver as to how he should proceed in the matter of liquidation and *ratified the action of the Receiver in making the purchase of the land from Lesher, approving the payments which the Receiver had already made, aggregating $6,000, with interest, and authorizing the payment of the $4,241.33, constituting the final payment as aforesaid.*

It appears, therefore, that the District Court's sanction to the purchase of these 1,200 acres of land from R. M. Lesher and to the expenditure by the Receiver of $10,000 with interest out of the funds of the Cattle Company in his hands as Receiver, came after this court had sent down its mandate in Appeals Nos. 4195 and 4196 directing the District Court to liquidate "for the best price and on the best terms obtainable"; that there "should be no further delay trusting to or hoping for a change in conditions, or for speculative purposes"; and stating that "*the time has arrived when there should be retrenchment instead of expansion*".

The circumstances under which the purchase was made by the Receiver.

The contract for the purchase of the property from R. M. Lesher was entered into under date of June 13, 1922. The contract itself is set out in the record (Tr. pp. 38-43). It was entered into between R. M. Lesher as seller and George H. Calligan as purchaser. Calligan was foreman for the so-called Spanish Ranch of the Union Land and Cattle Company. Calligan later assigned the contract to Mr. Smith, the Receiver. The

contract provided that the purchase price should be $10,000, with interest on deferred payments at 6%. The purchase price was payable as follows:

$1,000 on the date of the contract, June 23, 1922;

$1,000 on or before December 1, 1922;

$4,000 on or before June 21, 1923;

$4,000 on or before June 21, 1924.

The first two payments of $1,000 appeared in the Receiver's contemporaneous accounts *as items of rent,* no reference being made to the contract. The first reference to the contract was made in the Receiver's account for July, 1923, in which the item of $4,241.33 appeared as a payment on account of the purchase price of the Lesher property. The July, 1923, account was not heard until February, 1924, at which time upon the objection of these appellants, the court refused to allow the item because no formal application for authorization of the Receiver to purchase the Lesher property had been made. The first formal application by the Receiver for approval of the purchase of this land was, therefore, the one which was embodied in the petition filed as aforesaid on May 26, 1924, and it was decided by the District Court on August 4, 1924.

By applying this sum of $10,000 to the purchase of its lands, the fund available to the unsecured creditors is depleted and that which is subject to the lien of the bond mortgage is increased.

Appellants' objection to the course taken by the District Court in this matter rests not only upon the

proposition that the purchase of these lands is opposed to a policy of liquidation and is part of a policy of expansion rather than a policy of retrenchment, in violation of this court's mandate in Appeals Nos. 4195 and 4196, but upon the further proposition that it constitutes, at a time when the receivership is on the point of terminating, a withdrawal of $10,000 from the fund from which these appellants and the other unsecured creditors of the Union Land and Cattle Company must be paid, and an application of such moneys to the purchase of property which becomes subject to the lien of the secured creditors under the bond mortgage.

The general funds in the hands of the Receiver are subject to the payment of the unsecured creditors, for the reason that the bond mortgage by its express terms covers *only* the real estate in Nevada belonging to the Union Land and Cattle Company and approximately two-thirds of the stock of the Antelope Valley Land and Cattle Company. Under the order appealed from, the Receiver takes $10,000 from this fund, which is available to the unsecured creditors, and transmutes it into real estate which forthwith becomes subject to the lien of the bond mortgage and, therefore, not subject to the satisfaction of the claims of the unsecured creditors. This constitutes an additional and a very impelling reason against the course taken by the District Court in this matter.

The grounds upon which the District Court seeks to sustain the order are invalid.

The District Court, in the opinion which it filed on August 4, 1924, gives its reasons for authorizing the purchase of these lands, saying:

> "The purchase of the Lesher land does not at first view seem like liquidation, but on careful consideration it appears to me that its acquisition is not only vital, but that it will facilitate rather than delay sale of the Spanish Ranch. In itself it is well worth the money asked. It is in the mountains and is covered with a large amount of feed; this, with its elevation, makes it valuable as summer range, and especially so in a dry year. Several hundred steers can be fattened thereon each season. It possesses a singular strategic value due to its location in the heart of a large and valuable range used and claimed in connection with the Spanish Ranch. An independent owner of the tract can graze sheep over the surrounding range in such manner as to take much of its use and value away from those who may be operating the Spanish Ranch. Incomplete control of the range, if a fact, will be given much weight by any one contemplating purchase of this portion of the property. The receiver was therefore orderded to complete the purchase of the Lesher land."
>
> (Tr. pp. 12-13).

These reasons are purely matters of expediency.

Even upon the ground of expediency, they are inadequate for reasons which we shall later show. But, on any view they afford no answer to the elements of primary injustice inflicted upon the appellants by this order.

The Union Land and Cattle Company is a private concern. It has been in the hands of the Receiver and of the District Court for upwards of five years. All of the claims against the Union Land and Cattle Company have been adjudicated and no issues whatever remain to be litigated. All this has been emphatically pointed out by this court in its opinion of April 7, 1924, in Appeals Nos. 4195 and 4196. Under such circumstances, the duty of the District Court is to liquidate and terminate the receivership and not to take funds in the hands of the Receiver and buy tracts of land which it may deem valuable in connection with tracts of land already owned. Much more apparent than in the usual case does this appear when it is considered that the real estate holdings of the Union Land and Cattle Company in Nevada have been totally unsalable through the entire period of the receivership and the depressed condition of the livestock and real estate market in the State of Nevada is considered.

This order authorizing the investment of $10,000 in additional lands is made in the teeth of the mandate of this court in Appeal No. 4196, condemning the course taken by the District Court in ordering the investment of any further moneys in livestock. If (a year and a half ago) it was error for the District Court to employ the funds in the hands of the Receiver in buying livestock which could be put upon the ranges already owned by the Cattle Company, much more so must it appear erroneous for the District Court to employ funds in the hands of the Receiver in buying additional lands.

Finally, it appears that another element of injustice to appellants lies in this order. By the order $10,000 was taken out of a fund which could be used to satisfy the claims of the unsecured creditors and irretrievably placed beyond their reach. The $10,000, if left in the hands of the Receiver, would all go to the satisfaction of the unsecured creditors' claims. If the order stands, and the Lesher lands are purchased, the said lands will come under the lien of the bond mortgage and will be available to the secured creditors but not to the unsecured creditors or to appellants.

II. ASSIGNMENTS OF ERROR.

Appellants assign as error and abuse of discretion the making of the order of August 4, 1924, authorizing the Receiver to make the final payment of $4,241.33 on account of the purchase of the Lesher lands and confirming and approving the previous payments on account of the purchase price of said lands of $1,000, $1,000 and $4,241.30 (Assignment of Error No. 1; Tr. pp. 67, 68).

Appellants assign as error the making of the order aforesaid for the reason that the course approved by such order constitutes the authorization of a capital investment in land and the authorization for the carrying out of a policy of continued operation in lieu of a policy of retrenchment, the former course having been prohibited by this court in its orders and opinions

filed on April 7, 1924, in Appeals Nos. 4195 and 4196 (Assignments of Error Nos. 2 and 3; Tr. pp. 68, 69).

Appellants assign as error the order of the District Court aforesaid for the reason that the purchase of the lands from said Lesher and the application by said Receiver of funds of the Union Land and Cattle Company in his hands as such Receiver to the payment of the purchase price thereof, constituted a withdrawal of said funds so paid from a fund available to appellants and the unsecured creditors of the Union Land and Cattle Company, and a converting of said funds into real property which will not be available to appellants and the unsecured creditors because said lands become subject to the lien of the bond mortgage dated September 1, 1916 (Assignment of Error No. 4; Tr. p. 69).

III. BRIEF OF THE ARGUMENT.

(1) It is error for a court to authorize the receiver of a private corporation to invest in land. Under the circumstances here shown, the order appealed from was clearly an abuse of discretion.

The Union Land and Cattle Company, as determined by this court in Appeals Nos. 4194, 4195 and 4196, is a *private corporation.** The business enterprise which it conducted—that of owning and operating sheep and cattle ranches in the States of Nevada and California—was

*"The Cattle Company is a private corporation in every sense of the word, engaged in a private enterprise, and the magnitude of its holdings does not change its character or give it immunities not enjoyed by other debtors." Per Rudkin, J., in **297 Fed. 353.**

a private enterprise. The Cattle Company was not a public utility and was not at any time engaged in performing a public service but it was at all times engaged in carrying on an enterprise for the personal gain of its stockholders.

As pointed out by this court in Appeals Nos. 4195 and 4196, the duty of the receiver of a private corporation, and the duty of a court appointing such a receiver, is to wind up the affairs of the corporation as soon as may be, and as soon as the claims of the creditors of the corporation can be determined.

> *Kerr on Receivers,* 5th Ed. p. 268;
> *Gardner v. London, Chatham and Dover Ry. Co.,* L. R. 2 Chancery App. 201.

We start, therefore, with the premise that the Union Land and Cattle Company is a private corporation, as distinguished from a corporation engaged in serving the public. If no further considerations existed and the question presented upon this appeal were solely as to the propriety of the District Court's authorizing its Receiver to expend $10,000 in purchasing land, it is submitted that the question should have to be answered in the negative, because of the rule that the receiver of a private corporation is under the law required to hold together the assets in his hands for the benefit of creditors *only* so long as it is necessary to determine who are the creditors entitled to share in the distribution, and is prohibited from making investments in the hope or upon the speculation that he can make money for the trust estate.

We shall present in categorical fashion the circumstances which exist in the present case which emphasize the invalidity of the order of the District Court appealed from and which establish, it is submitted, very definitely that the purchase of these lands by the Receiver constituted an invasion of the rights of the appellants and the other unsecured creditors of the Union Land and Cattle Company.

First.—The purchase of these lands and the investment of $10,000, plus interest thereon, by the Receiver were consummated, *not* at the inception of the receivership; they were consummated on August 4, 1924, after this receivership (a receivership over a private corporation performing no public functions whatever) had been operated by the District Court of Nevada through its Receiver for over four years; after such operation had been carried on for four years at an annual loss, which established definitely that even under the most economical management the receivership could not be operated except at a loss (Tr. p. 30); after unsecured creditors holding claims aggregating in their principal amounts over $3,000,000 had been without interest and without any payment whatever on their claims for over four years during which time, in the language of this court, "the processes of the courts against its (the Cattle Company's) property have been stayed"*; finally, after the Receiver and the District Court had been told by this court in its opinion in Appeals Nos. 4195 and 4196 rendered on April 7, 1924, to "make a sale of the prop-

*297 Fed. 353.

erty for the best price and on the best terms obtainable'' and that ''there should be no further delay trusting to or hoping for a change in conditions, or for speculative purposes''. The order appealed from, therefore, and the purchase which it authorized, came not at or near the inception of the receivership (even at which time we contend they would have been clearly invalid), but at what was supposed to be and what this Court had ordered to be, the very end of the receivership; after all of the claims of all of the creditors of the Union Land and Cattle Company had been settled and approved and after the only duty of the District Court and its Receiver was to sell the property of the receivership estate and pay off as far as possible the creditors whose claims had been allowed.

Secondly.—The purchase was made and authorized after appellants, holding unsecured claims, the principal amounts of which aggregated $1,800,000, and the complainant in the action, holding a claim, the principal amount of which was $400,000, had *for over a year and a half* been insisting that the Receiver should sell the properties in his hands and apply the proceeds with whatever other cash was in his possession to the payment *pro tanto* of the claims of the creditors.

Thirdly.—The purchase was authorized and the order appealed from was made in the face of the directions given by this court to the District Court in its opinion of April 7, 1924, in Appeals Nos. 4195 and 4196.

Fourthly.—The order was made and the purchase of these lands was authorized notwithstanding that this

court had reversed the order of the District Court of November 2, 1923, and held that it was improper for the District Court to invest $110,000 in the purchase of additional livestock which the Receiver and his manager testified could be advantageously handled upon the ranges of the Cattle Company.

Fifthly.—The land which the court authorized its Receiver to purchase with an outlay of $10,000 is situated in a mountainous district of Nevada. It is not only admitted, but it has been asserted by the District Court and by the Receiver in the appeals which have heretofore been argued before this court in connection with this receivership, that it is a practical impossibility to sell livestock properties in the State of Nevada at the present time owing to depressed conditions in the market for such lands and in the live stock industry itself generally.

Sixthly.—Owing to the provisions contained in the deed of trust executed by the Union Land and Cattle Company to the First Federal Trust Company and Milton R. Clark under date of September 1, 1916, every acre of the lands so purchased falls immediately under the lien created by that instrument. Thus, every cent of money which the Receiver draws from the liquid assets of this corporation to pay for this land is taken irrevocably from appellants and the unsecured creditors and turned over to the bond-holders secured by the lien of the deed of trust.

We submit that under the most favorable conditions it is an extraordinary thing for a receiver of a private

corporation to invest money in real property, and this is true even though such investment be made at the inception of a receivership, that is to say, at a time when all parties to the liquidation are bound to assent to the proposition that the property of the debtor corporation shall be held in the possession of the court for a certain period into the future.

We submit, however, that when such a step is taken after four years have elapsed; after the receivership court has operated the property for four years at a loss; after all the claims of all the creditors have been approved and no further issues remain to be determined in the receivership action; after it has been adjudicated by a higher court that it is the duty of the receivership court to liquidate and sell forthwith; when the real property purchased is demonstrably unsalable; and, finally, when the moneys applied upon the purchase price must necessarily be taken irrevocably from one set of creditors and turned over to another set of creditors. such an order is indefensible.

(2) The order of August 4, 1924, authorizing the purchase of the Lesher lands and the payment of $10,000 plus interest, therefor, is in violation of the mandate of this court in Appeals Nos. 4195 and 4196.

This point has already been made as one of the contributing reasons why the order of the District Court was invalid, as an abuse of the District Court's discretion.

It is also to be urged as a separate ground for the invalidity of the order appealed from.

In the order of November 2, 1923, Judge Farrington had denied the petition of these appellants and of the First National Bank of San Francisco, the complainant in the action, for an order directing the Receiver to liquidate. Upon Appeal No. 4195 this court modified Judge Farrington's order and directed him to order his Receiver to liquidate the property

> "for the best price and on the best terms obtainable, and there should be no further delay trusting to or hoping for a change in conditions, or for speculative purposes".

In the order of November 2, 1923, Judge Farrington authorized his Receiver to expend $110,000 upon the purchase of additional livestock which the Receiver desired to use upon the ranges of the Cattle Company. Upon Appeal No. 4196 this court reversed the order, held that it was error for the District Court to make the authorization, saying:

> "The order authorizing the incurring of an indebtedness of $110,000, for the purchase of additional cattle and sheep, seems inconsistent with a policy of speedy liquidation. Such orders would have been justified in the earlier stages of the receivership but the time has arrived when there should be retrenchment instead of expansion."

It is submitted that the order authorizing the Receiver (within three months after the coming down of this court's mandates on Appeals Nos. 4195 and 4196) to invest $10,000 in land in a country where land is a drug on the market, is invalid as a flat violation of the mandates of this court in Appeals Nos. 4195 and 4196.

(3) The order authorizing the purchase of the Lesher lands and the expenditure of $10,000 thereon by the Receiver is invalid as to appellants because it takes from them $10,000 and transmutes it into property which becomes subject to the lien of the bond mortgage.

Under the deed of trust of September 1, 1916, executed by the Union Land and Cattle Company to the First Federal Trust Company and Milton R. Clark as Trustees, the lien of the trust deed is restricted to 224,000 acres of land owned by the Union Land and Cattle Company in the State of Nevada and to approximately two-thirds of the stock of the Antelope Valley Land and Cattle Company, one of the subsidiary corporations of the Cattle Company. The livestock and other personal property of the Cattle Company remain clear of this trust deed. *The trust deed, however, contains the usual clause rendering subject to its lien real property after acquired by the Cattle Company.* (See Tr. on Appeal, No. 4195, p. 289.)

It is apparent, therefore, that the $10,000, while it remained in the hands of the Receiver, constituted free assets of the Cattle Company and subject at the termination of the receivership to be applied in liquidating the indebtedness of appellants and of the other unsecured creditors of the Cattle Company.

The moment, however, that the $10,000 was taken by the Receiver and applied to the purchase of the Lesher lands, such lands became subject to the lien of the bond mortgage. The net result of the transaction, therefore, must necessarily be that by the purchase of these lands

$10,000 is withdrawn from appellants and the unsecured creditors of the Union Land and Cattle Company and is in fact turned over to the bond holders under the deed of trust.

(4) The points relied upon by the court and the Receiver in justification of the purchase are invalid.

We have already quoted the portion from the opinion of the District Court rendered on August 4, 1924, in which Judge Farrington states his reasons for making the order authorizing the purchase of the Lesher lands.

Three reasons are relied upon as supporting the propriety of the order:

(a) That the purchase of the Lesher lands is necessary as a protective measure in order to prevent the impairment of the range of the Spanish Ranch;

(b) That the property purchased is worth at least the price which was paid for it; and

(c) That $6,000 and interest had already been paid upon the purchase price and that the failure to pay the remaining $4,000 would work a forfeiture of the amount already paid:.

We shall show that none of these reasons separately, nor all of them together, constitute a sufficient defense to the making of this order.

(a) The contention of the District Court and the Receiver that the purchase of the lands was essential to the protection of the Spanish Ranch is insufficient.

Mr. Smith, the Receiver, Mr. Petrie, the Receiver's manager, and Mr. W. H. Moffat, one of the principal stockholders of the Union Land and Cattle Company, testified that the purchase of the Lesher lands was essential in order to protect the range land of the Spanish Ranch.

The Spanish Ranch, which is one of the five or six divisions of the properties of the Union Land and Cattle Company, consists of approximately 100,000 acres of land situated in Elko and Humboldt Counties in the State of Nevada. Mr. Smith testified that the land purchased from Mr. Lesher (which consisted of 1,800 acres of land but in fact only 1,200 acres of flat land) lay along the north side of Tuscarora Mountain "in the middle of our range that I have described as the I. L. and the Winters property"; that Mr. Calligan, the manager of the Spanish Ranch, had mentioned to him in the early part of the receivership that this land by reason of its location was desirable in order to protect the range of the Spanish Ranch; that he had tried to buy it from Mr. Lesher, but that Mr. Lesher had wanted $15,000 for it, which Mr. Smith thought was too much; finally, on June 23, 1922, Calligan made a contract with Mr. Lesher for the purchase of the land for $10,000, taking the contract in his own name in order to prevent the land from becoming subject to the lien of the bond mortgage. The

first payment of $1,000 was made on June 21, 1922, by Mr. Calligan and was later refunded by the Union Land and Cattle Company to Mr. Calligan, such refund appearing in the June, 1922, account of the Receiver *as rent.* The second payment was made by Mr. Calligan in December, 1922, and was refunded to him by Mr. Moffat, who was in turn reimbursed by the Union Land and Cattle Company, the item appearing in the September, 1923, account of the Receiver *as rent.* The third payment amounting to $4,241.33, was made by Mr. Smith in June, 1923, and on July 18, 1923, Mr. Smith reimbursed himself out of the funds of the Union Land and Cattle Company, the item appearing in his July, 1923, account. The final payment is the one which was mentioned in the petition upon the basis of which the order appealed from herein was made.

Mr. Smith took an assignment of the contract from Mr. Calligan in June, 1923, taking the assignment in his own name in order, as he said, to prevent the land from falling under the lien of the deed of trust, *an apparently futile proceeding inasmuch as it was admitted that Mr. Smith held the property as a trustee for the receivership estate.*

The extent to which the purchase of the 1,200 acres of Lesher land was necessary to the maintenance of the range of the Spanish Ranch can be measured from Mr. Smith's own testimony and from certain admitted facts.

Mr. Smith testified that he feared that Mr. John G. Taylor, who owned land in the vicinity, might run cattle

over the range of the Spanish Ranch unless the lands in question were purchased as a barrier. He acknowledged, however, that he had never had any difficulty with Mr. Taylor and that Mr. Taylor had never run his cattle over the lands of the Spanish Ranch belonging to the Union Land and Cattle Company during the period of the receivership. Nor had anyone else. Mr. Smith testified as follows:

> "From the time I have been familiar with the property as Receiver up to the present time, I have had no difficulty whatever on account of that Lesher property from trespassers or otherwise." (Tr. pp. 44-45.)

So far as appears no such difficulty had ever been encountered by the Union Land and Cattle Company during the many years of its ownership of the Spanish Ranch. So far as appears those who were instrumental in assembling the properties going to make up the Spanish Ranch did not see fit to purchase the Lesher property, and throughout the many years that have intervened during which the Spanish Ranch has been operated, it has never been the actual cause of trouble. It is only after these properties have been in the hands of a Receiver for four years and are about to be sold upon the auction block that the supposed imperative necessity for the acquisition of the Lesher lands has become apparent.

Finally, in measuring the propriety of the action of the Receiver in acquiring at this time these 1,200 acres of land in order to fill out the range of the Spanish

Ranch, it is to be borne in mind that the Spanish Ranch, of all the divisions of the Union Land and Cattle Company, is with one possible exception the one which has been proven the most unprofitable.

Mr. Smith, himself, says:

> "We have operated the Spanish Ranch for pretty nearly four years and it has never paid its way." (Tr. p. 44.)

If, therefore, it was proper at this time for the Receiver of the Union Land and Cattle Company to take from the appellants and the other unsecured creditors of the Union Land and Cattle Company against their protest, $10,000 of free assets and apply it in the purchase of these 1,200 acres of land for the supposed protection of a portion of the range of the Spanish Ranch, by the same line of reasoning it can be held to be within the discretion of the District Court to purchase innumerable other sections of land which might be said to be protective or otherwise valuable to other of the more profitable divisions of the Union Land and Cattle Company.

(b) The contentions of the District Court and of the Receiver that the lands are worth at least the price paid for them.

It needs no argument to demonstrate that this point, even though true, would afford no justification for the order made. Even though it appeared that the lands might possibly be sold for more than was paid for them, the Receiver should not have been authorized to buy

them. Speculation in real estate is more to be condemned than speculation in livestock, and the latter course was definitely disapproved of by this court in its opinion of April 7, 1924, on Appeal No. 4196. The record, however, shows very definitely that the lands purchased are not worth the price paid for them.

Mr. Smith testified that he could not tell whether he could sell the lands for $3.00 an acre—in fact, he said that he doubted whether he could obtain such a price (Tr. p. 44). The purchase price was $10,000, which would be on the basis of in excess of $8.00 per acre, if the tract contained 1,200 acres, or on the basis of over $5.00 an acre if it be assumed that the tract contain 1,800 acres.

Mr. Petrie testified that he thought that the price was reasonable, but it is apparent that his opinion was based upon the fact that he thought its purchase was essential for the protection of the range of the Spanish Ranch (Tr. pp. 48-50).

Mr. Moffat testified that he thought it could be sold; that he thought that if the Company wanted to dispose of it he could find a party who would buy it for what it had cost the Company (Tr. p. 51). If this testimony be taken as serious testimony to the effect that $5.00 or $8.00 per acre can be obtained for the lands, it is opposed by the experience of the past four years, the known conditions now existing in Nevada with respect to the sale of livestock lands, and by the character of the lands themselves. The only property which the Receiver has been able to sell in Nevada after four and a

half years is the H. C. Ranch which has been sold upon the basis of $3. per acre. The Spanish Ranch is of all the divisions of the Union Land and Cattle Company properties the least productive and the Receiver has not been able to obtain an offer of any kind for it. This particular land is in one of the most inaccessible parts of the Spanish Ranch.

We submit that the argument as to the value of the lands purchased is in the first place of no avail; secondly, that it has no foundation in fact.

(c) The argument of the District Court and the Receiver that failure to approve the purchase would result in the loss of the amounts already paid.

The petition upon which was based the order of August 4, 1924, with reference to the purchase of these Lesher lands, was filed on May 26, 1924. This was the first time in the history of the receivership that the Receiver presented to the court an application upon notice to appellants and to the creditors for an order authorizing the purchase of these lands. This was so notwithstanding that it was the uniform practice of the Receiver as to matters of the slightest import to apply to the court for directions and authority and to give the creditors an opportunity to be heard in connection with them.

The contract to purchase under which the lands were acquired was entered into as above stated on June 23, 1922, between Lesher, the seller, and George H. Calligan, the manager of the Spanish Ranch. The payment of

$1,000 due on January 23, 1922, and the payment due under the contract on December 1, 1922, were made by Calligan and he was later reimbursed by the Receiver. These two items of reimbursements appear in the Receiver's accounts for June, 1922, and September, 1923, *as items of rent,* no mention being made whatever of the fact that a contract had been made for the purchase of the lands. The first intimation to appellants or the creditors of the contract of purchase came when the Receiver's account for July, 1923, was filed. In June, 1923, Mr. Smith, the Receiver, took the assignment of the contract from Calligan, made the payment of $4,241.33 due under the contract on June 21, 1923, and, having reimbursed himself from funds of the Union Land and Cattle Company in his hands as receiver, entered that item in his July, 1923, account.

The account for July, 1923, was not heard until January 12, 1924. At that time these appellants objected to the allowance of this item upon the ground that there had been no prior application to the District Court, with notice to appellants, for an order authorizing the Receiver to make the purchase of the lands. These objections were argued and submitted to the District Court on January 12, 1924, and on May 26, 1924, they were decided by the District Court, Judge Farrington sustaining the objections upon the ground upon which they had been urged by these appellants. Thereupon the Receiver filed the petition upon the basis of which the order appealed from was made.

Mr. Smith gives the following reasons for not having followed the usual procedure; for not having applied to

the court for authority in connection with the contract for the purchase of these lands until more than two years after the contract itself had been entered into and until the sum of $6,000 had been paid out on account of the purchase price, *$2,000 of it having been returned as rent in his accounts:*

> "The reason why the usual procedure wasn't followed by filing a petition and having a hearing, advising the creditors of the proposals when the $4,000, plus interest, was paid on account of the contract, was as I told you. I talked to Judge Farrington himself in his chambers and he told me he wasn't familar with the land and that I would have to use my best judgment; so I went up there to get Mr. Calligan and Mr. Calligan wasn't in condition to see me or do business and I couldn't meet him and the contract matured and unless it was paid on the date it was due, what had been paid already would have been forfeited and Mr. Lesher would have still owned the property. Afterwards, Mr. Calligan went to Elko and conveyed the property, his right, to me. I took it in my name, as I told you, to keep it from being complicated with the mortgage in San Francisco. In other similar transactions involving purchases, certainly in the channels of capital expenditure, I have made it a customary procedure to file petitions and to advise the creditors and to have a hearing with reference to such purchase. These accounts, as fast as they came, were put into Court in the usual way and the judge did not pass upon them until the time when you know, when the objections were made. They were six months behind, were not passed upon."

Under the foregoing circumstances, we submit that the Receiver is in no position to urge the fact that he made the first three payments without authority as a ground for obtaining the District Court's approval of

the transaction. The consequences to appellants of his action are that they together with the other unsecured creditors of the Union Land and Cattle Company will simply lose $10,000 if the order appealed from is allowed to stand.

It is respectfully submitted that the order appealed from should be reversed.

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Dated, January 26, 1925.